BEFORE THE PETROLEUM AND NATURAL GAS REGULATORY BOARD, NEW DELHI

IN THE MATTER OF

M/s Welspan Maxsteel Ltd.  .......... Complainant / Petitioner

Versus

M/s Gas Authority of India Ltd.  ............... Respondent-1

Union of India (through Secretary, Ministry Of Petroleum & Natural Gas)  ............... Respondent-2

AND

M/s Ispat Industries Ltd.  .......... Complainant / Petitioner

Versus

M/s Gas Authority of India Ltd.  ............... Respondent-1

Secretary, Ministry of Petroleum & Natural Gas  ............... Respondent-2

FACTS OF BOTH THE CASES:

Both the complainants / petitioners have lodged separate complaints under Section 25 of the Petroleum & Natural gas Regulatory Board Act, 2006 (hereinafter referred to as ‘the Act’) against the opposite parties with the averments that —

M/s Welspan Max Steel Ltd. (hereinafter referred to as ‘Welspan’) acquired the undertaking of Vikram Ispat, a unit of Grasim Industries Ltd. under the Scheme of Arrangement between Grasim Industries Ltd. and Vikram Sponge Iron Ltd. and in furtherance of the order dated 29th April, 2009 passed by the Hon’ble High Court of Madhya Pradesh, Indore Bench. Thereafter, the name of the company was changed to M/s Welspan
Max Steel Ltd. and a Certificate of Incorporation was accordingly issued by the concerned Registrar of Companies on 1.7.2009.

2. ‘Welspun’ is engaged in the business of manufacturing of gas based sponge iron, which is a substitute of imported steel scrap – basic raw material for steel making. It has been purchasing natural gas from GAIL (R-1) under the Gas Supply Agreement since 1993 and lastly, they entered into Gas Sales and Transmission Contract (GSTC) on 30.12.2006 for supply of gas at Welspan’s plant at Village Salav in District Raigarh, Maharashtra.

3. Union of India (R-2) revised the price of non-APM natural gas by issuing a direction on 24.11.2010 and fixed its price at USD 5.25/mmbtu and made this revision of price effective from 1.7.2010. GAIL (R-1) communicated about the retrospective revision of price to ‘Welspan’ vide letter dated 29.11.2010.

4. It is stated that under the GSTC dated 30.12.2006, GAIL (R-1) had reserved the right to fix the gas price at any time in future in furtherance of the direction of the Ministry of Petroleum & Natural Gas (UOI / R-2) and GAIL (R-1) started issuing invoices from November, 2010 at revised rates of natural gas but simultaneously, issued / raised a debit note of Rs. 58585911.32 on 4.12.2010 towards the differential amount for the period 1.7.2010 to 15.11.2010.

5. It is contended by ‘Welspan’ that the action of GAIL (R-1) of raising demand of differential amount and to implement the revised rates of gas with retrospective effect is a result of mis-construction of Ministry’s direction dated 24.11.2010 and the said
Agreement dated 30.12.2006; and is also in violation of the principles of natural justice and
the principles of fair trade and practice.

6. It is also stated by ‘Welspun’ that various protests against the retrospective revision of
price were made to the Ministry of Petroleum & Natural Gas by them and the Sponge Iron
Manufacturers Association but before the representation could be considered by the Ministry,
GAIL threatened ‘Welspun’ that the said amount of Rs. 5858911.32 would be recovered by
invoking the Letter of Credit in case, the amount is not paid to it immediately.

7. ‘Welspun’ had thus no choice but to succumb to the threat of GAIL and made the
payment of Rs. 5858911.32 under protest and conveyed it to GAIL (R-1) that the protest
shall remain effective till the issue of retrospective implementation is amicably settled.
However, GAIL (R-1) expressed its inability to grant any relief under the pretext that the
retrospective operation of revised rates was directed to be made by the Ministry (UOI).

8. ‘Welspun’, in view of above, approached the Petroleum & Natural Gas Regulatory
Board (hereinafter referred to as ‘the Board;') and requested for issuing a direction to the
respondent to withdraw the revision in the gas price with retrospective effect and also to issue
direction to them for refund of the said amount of Rs. 5858911.32 along-with interest for the
period commencing from 1.7.2010 to 30.11.2010.

9. M/s Ispat Industries Ltd. (complainant / petitioner) (hereinafter referred to as ‘M/s
Ispat’) is a public Company and is engaged in the business of manufacturing of gas based
sponge iron and has been taking natural gas from GAIL (R-1) under the Gas Supply
Agreement dated 10.9.1991 where-under, the gas was being supplied at its plant at Village Dolvi, Raigarh, Maharashtra.

10. It is stated that in terms of Article 11.02 (b) of the Gas Sales Contract, the seller (GAIL/R-1), as in Welspun agreement, had reserved the right to fix the gas price at any time in future as per direction of the Government of India issued from time to time. The non-APM price of gas in Maharashtra, Gujarat and along HVJ was fixed at USD 4.75/mmbtu by the Ministry of Petroleum & Natural Gas vide its letter No. L-12015/1/05-GP dated 19.4.2006.

As stated hereinabove, Union of India (R-2) revised the price of non-APM natural gas by issuing a direction on 24.11.2010 and fixed its price at USD 5.25/mmbtu and made this revision of price effective from 1.7.2010. GAIL (R-1) communicated about the retrospective revision of price to ‘M/s Ispat’ vide letter dated 29.11.2010.

11. As a consequence of the rise in price of non-APM natural gas, GAIL (R-1) raised invoices along with a debit note of Rs. 76783682.09 dated 4.12.2010 towards the differential amount of price for the period from 1.7.2010 to 15.11.2010.

12. The legality and the propriety of retrospectivity of the price rise, was also challenged by M/s Ispat by making representations with this contention inter-alia that the retrospective effect is causing huge business loss and additional financial burden, as this differential amount cannot be recovered from the customers to whom the finished goods had already been sold.
However, M/s Ispat made payment of differential amount under protest and compulsion on 22.12.2010 and by lodging this complaint before the Board extended the request to declare the actions of the respondent of retrospective revision contained in communication dated 29.11.2010 as illegal and also requested to issue a direction to the respondent to withdraw the revision in the gas price with retrospective effect from 1.7.2010 and further to issue a direction to GAIL (R-1) to refund the said sum of Rs. 76783682.09 along with interest @ 18% p.a. till the date of actual payment.

13. GAIL (India) Ltd. (R-1) while filing its reply in respect of the assertion made by ‘Welspun’ raised a preliminary objection that the Board does not have the power to adjudicate upon an issue relating to the price rise of natural gas. It stated that the Government of India only is competent to determine the price of natural gas and moreover, the Gas Sales and Transmission Agreement dated 30.12.2006 entered into between GAIL (R-1) and Welspun clearly provides that Notwithstanding Article 10.1 (a), the Seller shall have right to fix the Gas Price at any time in future as per directive, instruction, order etc. of the Government of India from time to time and the Buyer shall pay to the Seller such price of Gas fixed by the Seller and the gas at revised non-APM rate was accordingly supplied to Welspun and the demand was also raised of differential amount in furtherance of the Government’s direction.

14. The respondent, in respect of other contentions of Welspun, admitted the receipt of letters and representations as described in the complaint and further admitted that the amount of Rs. 58585911.32 was made by Welspun under protest but denied the allegation that the retrospective operation of the price rise was illegal, unjust or unfair.
The respondent also denied Welspun's contention that the revision of gas price was not in line with the pragmatic approach of the Government and submitted that the Government was competent to revise the price with retrospective effect and the GAIL (R-1) was also entitled to realize the differential price of gas in terms of Article 10.1 (a) of the Gas Sale and Transmission Agreement.

15. In the matter of M/s Ispat, the respondent (GAIL/R-1) reiterated the same assertions, as were made in the matter of Welspun. It, however, made an additional contention that clause 14 of the Gas Supply Contract entered into by GAIL and M/s Ispat contains an arbitration clause which clearly states that the dispute, if not settled by the mutual consultation, would have to be referred for Arbitration and the decision of the arbitrator(s) would be final and binding on both the parties.

GAIL (R-1) further added that Section 12 read with Section 24 of the Act clearly stipulates that the Board would not have jurisdiction to entertain dispute in which the parties have agreed for Arbitration and therefore, this Board does not have jurisdiction to settle this dispute.

16. Welspun filed a rejoinder affidavit and reiterated its earlier contentions, as were made in the complaint and also stated that clause 10.1 (b) of the GSTC dated 30.12.2006 did not permit the respondent to raise the gas price with retrospective effect; it rather permits fixation of gas price in prospective manner and the direction of the Ministry to make the revision of price effective retrospectively could not over-ride the specific clause of the said Agreement dated 30.12.2006.
17. It is also stated by Welspun that the gas based Sponge Iron Producers while deciding their product selling price on monthly basis, consider their actual input cost incurred during the said month and for the finished products already sold out by them. Any subsequent unforeseeable increase in input cost (due to retrospective implementation) just cannot be recovered from their customers to whom they had sold their finished product. Moreover, in the global competitive environment, neither it is possible to do the business with a provision in the contract that any subsequent unforeseeable increase in the input cost at a later stage, if any, will be recovered from their customers (to whom goods have already been sold long back) nor the same can be absorbed by the supplier.

18. M/s Ispat also filed a rejoinder affidavit on the same pattern as of Welspun in respect of the legality and the propriety of the rise in price of natural gas with retrospective effect.

19. However, on the issue of reference of the matter to the arbitrator(s), M/s Ispat contended that this Board, which has specifically been created under the Act has the jurisdiction to set aside the arbitrary and unjust demand based on retrospective of price rise as no agreement can supersede the laws enacted by the Legislature.

20. Before proceeding further, it is relevant to mention that the contentions of all the parties on facts and law are common in both these complaints and moreover, the counsel appearing on their behalf are also the same, which led Ld. Members of our predecessor Bench to conduct the proceeding of both the cases in consolidated manner.

We, before the commencement of the proceeding before us, consulted the Ld. Counsel / representatives of all concerned and after seeking their consent for
consolidated hearing, conducted the proceeding of both these cases in consolidated manner.

21. At the very outset, we would like to state that the Union of India / Secretary, Ministry of Petroleum & Natural Gas (MOPNG) were not initially impleaded as respondent in both these complaints and our predecessor Bench had directed the complainant to implead Union of India as respondent and to serve it with the copy of complaints.

In follow-up action of our predecessor's order, a letter was sent to Union of India / MOPNG and the Ministry in response, sent a letter dated 5.6.2012 under the signatures of Ms. Sushma Rath, Director (GP), stating therein, that “the matter under dispute relates to pricing of natural gas which is not a notified product and as such any dispute relating to the price of gas is not admissible for intervention with the PNGRB under Section 11 (f) of the PNGRB Act.

It further stated that general power under Section 11 (a) cannot be invoked for powers specified under specific Section such as 11 (f) which is not notified and the petition is, therefore, liable for summarily disposal by virtue of being beyond the jurisdiction of the Board under the PNGRB Act, 2006.”

22. We, during the course of hearing on 18.10.2013 observed that the letter dated 5.6.2012 of Union of India does not amount to pleading and moreover, Union of India was not properly impleaded as a respondent and, therefore, directed the complainant / petitioner to properly implead the Union of India as a respondent and to serve upon it the copies of the complaints afresh.
23. On 28.11.2013, the matter was again heard and we found that the Union of India has been impleaded as respondent and the copies of complaints were also furnished in the MOPNG on 25.10.2013. A copy of our order dated 18.10.2013 was also sent to Union of India through speed post but a request was extended on behalf of the MOPNG for adjournment on the ground that the copies of the complaints were not furnished to it, whereas Ld. Counsel for the complainant exhibited the written acknowledgement of the MOPNG regarding the receipt of the copies of complaints.

However, all the Ld. Counsel for the respective parties / representative(s) submitted that only legal issues are involved in the matter and the parties can make their submissions even without seeking adjournment for filing written reply where-upon the arguments of all concerned were heard by us at length on 28.11.2013 and Mr. Prashant Narain, who had appeared for the MOPNG, requested for the grant of 7 days time for filing written submissions but we, with a view to rule out the possibility of any further adjournment, granted 10 days time to Union of India for filing the written submissions.

24. Union of India was thus obliged to file written submission on or before 9.12.2013 (being 7.12.2013 and 8.12.2013 as holidays on account of Saturday & Sunday) but no written submissions have been filed by it till date i.e. 3.4.2014.

25. On the issue of Arbitration Clause as it exists in the Agreement of M/s Ispat, it may be stated that this matter has earlier been examined by this Board and in “Shyam Industries Vs. GAIL” wherein it was held that an Arbitration Clause in an agreement does not oust jurisdiction of the Board to exercise its power under Section 11 (a) of the Act as it has been
formulated for the protection of interest of the consumers by fostering fair trade and competition amongst the entities.

The judgment of the Board was challenged by GAIL (R-1) before APTEL in Appeal No. 86/2011 and 87/2011 in which APTEL vide its judgment/order dated 9.3.2012 upheld the findings of the Board as below:-

"Only the Board has the requisite jurisdiction to decide the dispute raised by the consumer. In this respect, the PNGRB has given a clear finding to the effect that the Arbitration Clause found in the Agreement would not automatically restrict the jurisdiction of the Board to decide the dispute particularly when the said dispute is not arbitral dispute."

26. In the instant matter too, the controversial issue is the legal propriety of retrospectivity of price rise and the Board has to examine that as to whether the GAIL could recover the differential amount of the price rise with effect from 1.7.2010 whereas the Central Government/MOP&NG had issued direction to this effect on 24.11.2010.

27. We have also perused the relevant clause i.e. Article 10.1 (b) of the Gas Sales Agreement of the Welspun and the Respondent No.-1, which reads as under:

"Notwithstanding Article 10.1 (a), the Seller shall have right to fix the Gas Price at any time in future as per direction, instruction, order, etc. of the Government of India issued from time to time and the Buyer shall pay to the Seller such price of Gas fixed by the Seller."

\[\text{Signature}\]
28. In the matter of M/s Ispat, the relevant clause of Gas Sales Agreement is Article 11.01 (a), which reads as under:

**Article 11.01 (a)**

"The price of 1000 (one thousand) standard cubic meter of Gas having a minimum Net Heating Value of 8500 (eight thousand five hundred) Kilo calorie, per standard cubic meter shall be Rs. 1,400/- (Rupees One Thousand Four Hundred only). No rebate / premium shall be applicable for gas having a Net Heating Value in the range of 8500 (eight thousand five hundred) to 10,000 (ten thousand) Kilo Calorie per standard cubic meter. The average Net Heating Value of Gas supplied in the month shall be used for this purpose. **This price of gas shall be applicable as per the direction on the subject by Government of India from time to time.***"

29. We, at the first instance, would like to clarify that the issue of determination of price or the rise in price of natural gas is not before us for adjudication and we do not deny the fact that such matters are within the domain of the Central Government. But we, in order to protect the interest of consumers for which the Board has been empowered under Section 11 (a) of the Act, will examine the legality of retrospectivity of the price rise and to resolve this issue, the agreement between the complainant and GAIL (R-1) will play a pivotal role.

30. In the construction of a contract, the governing principle is to ascertain the intention of the parties to the contract through the words they have used and those are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found.
The literal meaning of 'retrospectivity' is 'dealing with past event or situation' or looking backward having reference to a state of things before the act in question whereas, operation of an order / act would be retrospective if it takes away or impairs any vested right acquired under existing contract in respect of the transaction or consideration already passed.

31. On perusal of Article 10.1 (b) of the contract pertaining to 'Welspun', the intention is apparent that seller has the right to fix the gas price at any time in future as per direction, instruction, order etc. of the Government of India issued from time to time.

The buyer (Welspun) is thus liable to make payment of price rise of natural gas w.e.f. 24.11.2010 when the direction was issued, and the burden of retrospectivity of this direction, if any, will have to be borne by the seller (GAIL/R-1).

32. Likewise, in the matter of 'M/s Ispat', the wordings, as used in Article 11.01 (a) of the Agreement that 'this price of gas shall be applicable as per the direction on the subject by the Government of India from time to time'.

In this clause, the expression 'from time to time' is sacrosanct, which means 'as occasion may arise'. Such words are introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted and therefore, not being able to act again in the same direction but such expression merely protects the person in prospectivity and not retrospectively.
Hon’ble Supreme Court of India in “State of Rajasthan & Others Vs. Basant Agrotech Limited and others” clearly held that the words, ‘from time to time’ may be associated with any number of times, of course subject to the principle of reasonableness and its impact but does not engulf the spectrum of retrospectivity or retroactivity in its ambit and sweep.

Hon’ble Court reiterated the same view in “M.P. Vidyut Karamchari Sangh Vs. M.P. Electricity Board; 2004 Indlaw SC 198” that the conspectus of authorities and the meaning bestowed in the common parlance admitted no room of doubt that the words ‘from time to time’ had a futuristic tenor and they did not have the etymological potentiality to operate from a previous date.

33. In view of above, we hold that the respondent did not have any right or authority to claim, recover or realize the price rise with retrospective effect from the complainants and the judgments of the Apex Court strengthen this aspect.

34. On the issue of interest claimed by complainants from GAIL (R-1) due to unlawful realization, it is relevant to state that ‘Welspun’ has not disclosed the rate of interest it would like to claim whereas M/s Ispat has claimed it at the rate of 18% p.a.

Apparently, the nature and relationship of the parties to the contract is commercial, so 12% interest p.a. appears to be appropriate while accepting claims of the petitioners.

35. We thus, hold that the act of respondent of realization / recovery of enhanced price of natural gas with retrospective effect is unlawful and against the principle of fair trade and is
detrimental to the interest of consumers and as such both the petitions deserve to be allowed as under;

ORDER

The action of retrospective realization of the amount of increase in price of natural gas by the respondent from the complainants is declared unlawful.

GAIL (India) Ltd. (R-1) is directed to refund a sum of Rs. 5,85,85,911.32 along with interest @ 12% p.a. from 1.7.2010 till the date of actual payment, to M/s Welspun Maxsteel Ltd. (petitioner/complainant).

GAIL (India) Ltd. (R-1) is also directed to refund a sum of Rs. 7,67,83,682.09 with interest @ 12% p.a. from 1.7.2010 till the date of actual payment, to M/s Ispat Industries Ltd. (Petitioner/complainant).

GAIL (India) Ltd. (R-1) shall make payment, as above, to the complainants within a period of one month from today.

All the parties shall bear their own costs.

The original order be kept on the file of Legal/02/2011 and its authenticated copy be placed on the file of Legal / 02A/2011.

(P.K. Bishnoi)
Member (PKB)

(Subhash Chandra)
Member (Legal)